

October 27, 2004

BEN LIVINGSTON
PO BOX 95227
SEATTLE WA 98145

Subject: Complaint filed against Norm Maleng – PDC Case #04-460
Complaint filed against Dave Reichert – PDC Case #04-521

Dear Mr. Livingston:

The Public Disclosure Commission (PDC) staff has completed its investigation of your complaint alleging that Norm Maleng, King County Prosecuting Attorney, and Dave Reichert, King County Sheriff, violated RCW 42.17.130 by using the facilities of their respective public agency to oppose Initiative 75 before the 2003 primary election.

Your complaint was received September 25, 2003, but investigation of your complaint was suspended pending the outcome of a Permanent Injunction that had been issued in King County concerning the Commission's application of RCW 42.17.130. The investigation was restarted May 3, 2004 following the State Supreme Court's reversal of the Permanent Injunction.

PDC staff reviewed your complaint in light of the following statute and administrative rule:

RCW 42.17.130 states in part:

“No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for...the promotion of or opposition to any ballot proposition.”

“[T]he foregoing provisions of this section shall not apply to the following activities:

...Activities which are part of the normal and regular conduct of the office or agency.”

WAC 390-05-273 states in part:

“Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17.130, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner.”

You stated that in forming the committee to prepare the voters' pamphlet statement in opposition to Seattle Initiative I-75 in the 2003 primary election, Terry Thomas, former Executive Director of the Seattle Ethics and Elections Commission (SEEC), solicited the participation of King County Prosecuting Attorney Norm Maleng and King County Sheriff Dave Reichert. You alleged that Mr. Maleng's use of the facilities of the County Prosecuting Attorney's office and Sheriff Reichert's use of the King County Sheriff's office to prepare the statement against I-75 constituted a violation of RCW 42.17.130.

We found that:

- It was the duty of the Seattle City Council under RCW 29.81A.080 to appoint a committee to prepare arguments advocating both approval and rejection of I-75 for the Seattle local voters' pamphlet in the 2003 primary election.
- During the 2003 election this responsibility was delegated to Terry Thomas, Executive Director of the SEEC, pursuant to Seattle Municipal Code 2.14.040(A).
- Because it was Mr. Thomas' express statutory duty to appoint individuals known to oppose I-75 to the committee preparing voters' pamphlet statements against the measure, Norm Maleng and Sheriff Reichert's participation in this committee was lawful. The use of the facilities of their respective offices to draft statements in opposition to I-75 thus satisfies the first test in WAC 390-05-273 for "normal and regular conduct" exempt from the prohibition of RCW 42.17.130.
- A similar determination was made by the Washington State Executive Ethics Board (EEB) in considering whether the Governor may use state resources to draft voters' pamphlet statements in support of or in opposition to statewide ballot propositions. In Advisory Opinion 03-02, the EEB stated that when the Governor is officially appointed by the relevant authorities to a statewide voters' pamphlet committee, using state resources to draft arguments that oppose or support a pending ballot proposition is part of the normal and regular conduct of his office. (In the case addressed by that Opinion, the relevant authorities were the Secretary of State, and the presiding officers of the senate and house of representatives.) The statutory authority in question originated not from any law granting powers specifically to the Governor, but from state elections law, specifically from statutes directing the Secretary of State and the presiding officers of the senate and house of representatives to appoint members to argument committees for the statewide voters' pamphlet. Consistent with this Opinion, PDC staff believes that Norm Maleng and Dave Reichert's statutory authority to use the facilities of their respective offices in drafting statements in opposition to I-75 derives from their appointment by Terry Thomas to the voters' pamphlet argument committee.

- In determining whether the conduct of an employee of a public agency is “normal and regular,” the second test is whether that conduct is usual, that is not effected or authorized in or by some extraordinary means or manner. It is not unusual for King County elected officials to provide argument statements for ballot measures in local voters’ pamphlets, since county officials have performed this function in several recent elections.
- On February 18, 2004, Amy Calderwood, Ombudsman-Director for the King County Office of Citizen Complaints, issued reports concerning Norm Maleng and Dave Reichert. The reports determine that Mr. Maleng and Sheriff Reichert had statutory authority to use the facilities of their respective offices to prepare statements against I-75. The report states that this authority derived from the officials’ appointment to the voters’ pamphlet argument committee by Terry Thomas, and more fundamentally from the duties of County Prosecutors and Sheriffs as outlined in state law. The report by the Ombudsman-Director concludes that the use of public facilities by Mr. Maleng and Sheriff Reichert to prepare statements in opposition to I-75 for the local Seattle voter’s pamphlet was part of the normal and regular conduct of their respective offices.

PDC staff concurs with the Ombudsman’s determination that Mr. Maleng and Sheriff Reichert acted in accordance with the normal and regular conduct of their offices in preparing opposition statements to I-75, although our conclusion rests specifically on the authority granted to Terry Thomas to fulfill his duties under state and local election law. Staff found no evidence that Mr. Maleng or Sheriff Reichert violated RCW 42.17.130 in their use of facilities of their respective offices to prepare voters’ pamphlet statements against I-75.

After a careful review of the alleged violations and relevant facts, we have concluded our investigation and, with the concurrence of the Chair of the Public Disclosure Commission, I am dismissing your complaints against Norm Maleng and Dave Reichert.

If you have questions, please feel free to contact Phil Stutzman, Director of Compliance, at (360) 664-8853 or toll free at 1-877-601-2828.

Sincerely,

Vicki Rippie
Executive Director

c: Norm Maleng, King County Prosecuting Attorney
Dave Reichert, King County Sheriff